

POLICY AND PROCEDURE MANUAL

COURT ALTERNATIVE DISPUTE RESOLUTION SERVICE

(CADRES)

Office of Court ADR
Maine Administrative Office of the Courts
December, 2009

**OFFICE OF COURT ADR
COURT ALTERNATIVE DISPUTE RESOLUTION SERVICE (CADRES)**

POLICY AND PROCEDURE MANUAL

December, 2009

Table of Contents

	<u>Page</u>
<i>Mission Statement of the Maine Judicial Branch</i>	
Introduction.....	5
 A. Overview of Court ADR in Maine State Courts	
1. CADRES Program Established	6
2. CADRES Committee Membership	6
3. Referral of Cases to ADR.....	6
a. Family Matters cases	
b. Small Claims cases	
c. Forcible Entry and Detainer cases	
d. Civil Cases	
1) Voluntary referral of civil cases in District Court	
2) ADR in Superior Court Civil cases	
 B. Application and Selection for ADR Rosters	
1. Roster Requirements.....	9
2. Application Review and Additions to Rosters	9
3. Acquiring Mediation Experience Through CADRES in Small Claims	9
4. Acquiring Mediation Experience In Office of Attorney General	10
 C. Inclusion and Maintenance on ADR Rosters	
1. Attendance at Mandatory Orientation Sessions.....	11
2. Assignments to Courts.....	11
3. ADR Providers Agreement.....	11
4. Mentoring Process for New Mediators on FM, SC and FED Rosters	11
5. Roster Lists; Directory of Superior Court ADR neutrals.....	12
a. Small Claims, Forcible Entry and Detainer and Family Matters mediators	
b. General Civil Litigation and Land Use/Environmental	
c. Directory of Superior Court ADR neutrals	
6. Annual Continuing Education Requirements.....	12
a. SC Mediation Roster	
b. FED Mediation Roster	

c.	All other ADR rosters	
d.	Inactive status	
e.	Carryover hours	
7.	Periodic Observation of SC, FED and FM Mediators.....	14
8.	Observation of Mediation by Non-Rostered Persons	14
9.	Complaint Process.....	14
D.	Assignments of Neutrals; Scheduling	
1.	Small Claims and FED Mediation.....	16
2.	Family Matters Mediation.....	16
3.	Mediation of Civil Cases in District Court.....	17
4.	ADR in Superior Court Civil Cases.....	17
5.	Land Use and Environmental Disputes.....	18
E.	Fee Policy for Neutrals	
1.	Payment for SC and FED Mediation.....	19
2.	Payment for FM Mediation.....	19
3.	Submission of Invoices to CADRES.....	20
4.	Payment for Land Use and Natural Gas Pipeline Mediation.....	20
5.	Payment for Environmental Enforcement Cases	21
6.	Fee Arrangement for Superior Court Neutrals.....	21
F.	Completion of CADRES Reports and Court Forms	
1.	SC and FED Mediation.....	22
a.	Report of Completed Mediation Session form	
b.	Pretrial Report form	
2.	FM Mediation.....	22
a.	Report of Completed Mediation Session form	
b.	Points of Agreement form	
c.	Child Support Worksheets	
3.	Land Use Disputes	23
4.	Superior Court Civil Cases.....	24
a.	Report of ADR Conference and Order form	
5.	Exit Questionnaires in SC, FED and FM Cases.....	24
G.	Domestic Abuse Screening and Mediation in FM Cases	
1.	Mandatory Domestic Abuse Screening Sessions.....	25
2.	Terminating Mediation on Account of Domestic Abuse.....	25
3.	Cases in Which a Protection from Abuse Order Exists.....	26
H.	<u>Privilege, Inadmissibility and Confidentiality</u>	27
	[RESERVED]	

I.	Practice Issues in Small Claims and FED Mediation	
	1. Who May Attend and Participate.....	28
	2. Length of Mediation Session.....	28
	3. Reporting Outcome of Mediation.....	28
	4. Effect of Agreement.....	29
	5. Pretrial Report Form (selected counties).....	29
	6. Damages in Excess of Statutory Amount.....	29
	7. Continuances.....	29
J.	Practice Issues in FM Mediation	
	1. Who May Attend and Participate.....	30
	2. Option of Meeting in Separate Rooms.....	30
	3. Length of Mediation Session.....	30
	4. Child Support Worksheets and Calculation.....	31
	5. Working with DHHS Support Enforcement Agents.....	31
	6. Working with Guardians Ad Litem.....	32
	7. Reporting Suspected Child Abuse or Neglect.....	32
	8. Reporting Outcome of Mediation.....	32
	9. Effect of Agreement.....	32
	10. Scheduling a Second or Third Session.....	33
	11. “No Show” Session.....	33
K.	Practice Issues in Superior Rule 16B ADR	
	1. Who Must Participate.....	34
	2. Deciding Who Else Should Participate.....	34
	3. Arranging the ADR Session.....	34
	4. Submitting Report After ADR Session.....	34
	5. Sanctions.....	35
L.	Conflicts of Interest and Conduct of Neutrals	
	1. Code of Conduct for Judicial Branch Neutrals.....	36
	2. Treat Parties With Courtesy and Respect.....	36
	3. Conflict of Interest.....	36
	4. Subsequent Professional Work for ADR Parties.....	36
M.	Self-Determination of Parties in Mediation.....	37
N.	Legal Advice in Mediation.....	38
O.	Good Faith	
	1. Requirement in FM Mediation	39
	2. Requirement in FED Mediation	39
	3. Sanctions Authorized.....	40

P.	Accommodation for Disability	
1.	General Policy.....	41
2.	Accommodations and Auxiliary Aids and Services.....	41
Q.	Determining A Party’s Capacity to Mediate.....	43
R.	Mediating When Interpreters are Used	
1.	Need for Interpreters.....	44
2.	Use of Interpreters.....	44
3.	Forms.....	45
S.	Immunity	
1.	FM, SC and FED Mediators.....	46
2.	Superior Court Neutrals.....	46
T.	Security.....	47
U.	Access to Clerks’ Offices and Court Files.....	48
V.	Professional Appearance and Decorum.....	49
	Appendices	50

MISSION STATEMENT OF THE MAINE JUDICIAL BRANCH

To administer justice by providing a safe, accessible, impartial, and efficient system of dispute resolution that serves the public interest, protects individual rights and instills respect for the law.

INTRODUCTION

This Policy and Procedure Manual is adopted by the Maine Administrative Office of the Courts, in conjunction with the Court Alternative Dispute Resolution Service (“CADRES”) Committee, to supplement information found in Rule 92 of the Maine Rules of Civil Procedure, the CADRES Operational Rules and the Code of Conduct for Maine Judicial Branch ADR Neutrals.

This Manual is intended for use by court-rostered neutrals, individuals who wish to apply to the court rosters for alternative dispute resolution (ADR), participants in mediation and other ADR processes, members of the bar, court staff and the general public. All neutrals on court ADR rosters shall comply with the policies set forth in this Manual. This Manual shall be revised and updated from time to time and shall be reviewed periodically by the CADRES Committee.

A. OVERVIEW OF ADR IN MAINE COURTS

1. CADRES Program Established

CADRES was created in 1996 as the successor to the Court Mediation Service. Section 18-B(1) of Title 4 of the Maine Revised Statutes establishes CADRES as part of the Maine Administrative Office of the Courts. The purpose of CADRES is to provide ADR services in the courts throughout the state. 4 M.R.S. § 18-B(1).

2. CADRES Committee Membership

The CADRES Committee is also established by statute as the oversight body to “set policy for and monitor” CADRES. Section 18-B(2) of Title 4 designates the membership of the CADRES Committee as follows:

- a. The Chief Justice of the Maine Supreme Judicial Court or a designee;
- b. The Chief Justice of the Maine Superior court or a designee;
- c. The Chief Judge of the Maine District Court or a designee;
- d. The State Court Administrator or a designee;
- e. A Justice of the Superior Court, who is appointed by and serves at the pleasure of the Chief Justice of the Supreme Judicial Court;
- f. A Judge of the District Court, who is appointed by and serves at the pleasure of the Chief Justice of the Supreme Judicial Court; and
- g. Any additional members appointed by the Chief Justice of the Supreme Judicial Court that the Chief Justice considers necessary to the committee’s operations.

4 M.R.S. § 18-B(6).

3. Referral of Cases to ADR

- a. Family Matters (FM) cases (District Court)

Since 1984, mediation has been required before a contested hearing in certain types of domestic relations cases may be held. 19-A M.R.S. § 251. Initially, the requirement applied only to cases involving minor children, but it was extended by court rule in 1997 to contested domestic relations cases involving no minor children. “Rules for Referral of Cases to Court Alternative Dispute Resolution Service,” No. SJC-319, effective 1/1/97 (“SJC-319”) (superseded in 2007 by Rule 92 of the Maine Rules of Civil Procedure).

Pursuant to Rule 92 of the Maine Rules of Civil Procedure, effective July 1, 2007, all contested divorce, parental rights, judicial separation and child support actions must be referred to mediation, unless the mediation requirement is waived. Mediation is optional in actions for visitation rights of grandparents, emancipation of minors, paternity, motions to modify a preliminary injunction, motions to enforce a judgment and motions for contempt. Mediation is not available in protection from abuse and protective custody actions, other than those cases that may be specially referred or included in a pilot mediation program. M.R.Civ. P. 92(b).

b. Small Claims (SC) cases (District Court)

Although many Small Claims cases had been referred to mediation (especially in Southern Maine) since the late 1970s, in 1997 SJC-319 also expanded the referral of Small Claims to mediation in all District Courts. Pursuant to Rule 92, parties in Small Claims cases may be required to participate in mediation as ordered by the court. This requirement does not apply to Small Claims disclosure actions. M.R. Civ. P. 92(c). As assigned, mediators on the Small Claims Mediation Roster will appear at court to mediate cases referred to mediation and report the outcome on approved forms.

c. Forcible Entry & Detainer (FED) cases (District Court)

Pursuant to 14 M.R.S § 6004-A, effective January 1, 2008, parties in FED cases may be referred to mediation. *See also* M.R. Civ. P. 80D(e)(2). As assigned, mediators on the Forcible Entry & Detainer Mediation Roster will appear at court to mediate cases referred to mediation and report the outcome of mediation sessions on approved forms.

d. Civil cases (District and Superior Courts)

(1) Voluntary referral of civil cases in District Court.

Pursuant to Rule 92, any civil action may be referred to mediation by agreement of the parties or at the discretion of a judge upon a finding of good cause. M.R.Civ. P. 92(a)(3). The referral may be to ADR through CADRES or to another ADR process agreed to by the parties. If a case is referred to CADRES for ADR, an administrative charge is assessed. M.R.Civ. P. 92(a)(3)(A). There is no fixed fee for the mediation; rather, the parties negotiate the fee with the selected neutral and pay the fee to the neutral selected.

(2) ADR in Superior Court civil cases

As provided by Rule 92(a)(1), Rule 16B of the Maine Rules of Civil Procedure requires an ADR session to be held in most types of civil

actions in Superior Court. Several exempted categories of civil actions are listed in Rule 16B, and the requirement for an ADR session may be waived by a justice for good cause shown on a timely filed motion of the parties. M.R. Civ. P. 16B(b).

Litigants and counsel select the form of ADR in which they will participate: mediation, non-binding arbitration or early neutral evaluation. They also select a neutral to conduct their ADR process. There is no fixed fee for ADR; rather, the parties pay a negotiated fee to the neutral selected.

B. APPLICATION AND SELECTION FOR ADR ROSTERS

Pursuant to CADRES Operational Rules, individuals requesting inclusion on the court approved ADR rosters are subject to the following procedures:

1. Roster Requirements

The CADRES Operational Rules establish the criteria for eligibility to eight statewide ADR rosters:

- Domestic Relations Roster
- Small Claims Mediation Roster
- Forcible Entry and Detainer Mediation Roster
- Environmental/Land Use/Natural Gas Pipeline Mediation Roster
- General Civil Litigation Roster
- Superior Court Mediation Roster
- Superior Court Arbitration Roster
- Superior Court Early Neutral Evaluation Roster

The criteria for inclusion on each roster include training and experience, as well as background in one or more substantive areas. Criteria for eligibility for each roster are attached in the Appendices to this Manual (see Appendix II-D).

From time to time, CADRES also establishes temporary mediation rosters for pilot projects. For example, pilot project rosters have been created for the mediation of Protective Custody (PC) cases and for Protection from Harassment (PH) cases.

2. Application Review and Additions to Rosters

CADRES ADR rosters are opened twice yearly. The annual application deadlines are January 31 and July 31. Following those deadlines, all applications received in the previous six (6) months are reviewed. Successful applicants are notified of inclusion on the roster each spring and fall.

3. Acquiring Mediation Experience Through CADRES in Small Claims

CADRES provides a limited opportunity to new mediators to acquire the hours of experience as a mediator required for inclusion on a CADRES roster. Mediator trainees are permitted to co-mediate Small Claims cases with the assigned CADRES mediator as a way of obtaining experience as a mediator to meet eligibility requirements for the CADRES rosters. Prospective applicants to CADRES who have already completed the required minimum number of hours of training in mediation skills for a roster may send a letter to the CADRES Director requesting placement on a list for co-mediation opportunities with a current Small Claims mediator. There is no pre-rostering co-mediation opportunity in mediation of FM cases. The Director will arrange such co-mediation

opportunities and will notify the mediator trainee of the date and time of the session(s).

4. Mediation Experience in the Office of Attorney General

CADRES recognizes up to four (4) hours of mediation experience as a mediator in the Office of the Attorney General's telephone-based consumer protection mediation program.

C. INCLUSION AND MAINTENANCE OF NEUTRALS ON ADR ROSTERS

1. Attendance at Mandatory Orientation Sessions

Following acceptance, a neutral is conditionally approved for one or more CADRES rosters, pending completion of the criminal background check and attendance at a mandatory orientation session. Orientation sessions are usually held each spring and fall for new neutrals added to the court ADR rosters.

For new Small Claims mediators and FED mediators, the orientation session is a half-day introduction to forms, procedures and policies. For new Family Matters mediators, the orientation session is a one-day introduction to forms, procedures, policies and selected practice issues, including domestic violence.

New Superior Court neutrals are required to attend a half-day general orientation session and training sessions specific to mediation, early neutral evaluation and arbitration (depending on which of the rosters they are joining).

2. Assignments to Courts

All neutrals are asked to designate which court locations and/or counties they would like to serve. Based on those preferences, neutrals are assigned to courts and listed on those court rosters. A neutral is not necessarily assigned to all courts requested but will not be assigned to any courts the neutral does not wish to serve.

3. ADR Providers Agreement

Mediators on the Small Claims Mediation Roster, Forcible Entry and Detainer Mediation Roster and Domestic Relations Mediation Roster are required to sign a contract with CADRES. This contract, known as the ADR Providers Agreement, spells out the terms of their relationship to the Judicial Branch as independent contractors.

4. Mentoring Process for New Mediators on FM, SC and FED Rosters

After inclusion on the Family Matters, Small Claims or Forcible Entry & Detainer Mediation Rosters, but before commencing active service as a mediator, mediators shall participate in a mentoring process as set forth in the "CADRES Guidelines for Pre-Service Mentoring of District Court Mediators" (see Appendix III-A).

5. Roster Lists; Directory of Superior Court ADR Neutrals

CADRES maintains and distributes the approved list of all neutrals on its statewide rosters. A directory appears on the Judicial Branch website, and printed copies of the lists are available upon request.

a. Small Claims, FED and FM Rosters

Updated roster lists are periodically distributed to all District Court clerks. Once new mediators are officially assigned to a court, their names will appear on the lists sent to the clerks at those courts.

b. General Civil Litigation (District Court) and Land Use/Environmental Rosters

CADRES maintains a list of short “profiles” for each mediator on the roster for general civil cases in the District Court and the Land Use/Environmental/Natural Gas Pipeline Mediation Roster. The profiles include a brief description of each individual’s background and fees charged. When civil cases are referred to CADRES for mediation in District Court, or requests for mediation arise pursuant to the statutory mediation programs for land use, natural gas pipeline or environmental enforcement disputes, CADRES sends the list to counsel and/or parties for use in selecting a mediator.

c. Directory of Superior Court Neutrals

The Judicial Branch publishes a directory of Superior Court neutrals on its website at *www.courts.state.me.us*. The directory includes information about the neutral’s professional background, education, ADR training and experience and fees. Any neutral who does not want such information to appear on the website may file a written request to CADRES for exclusion. The directory is updated twice annually. Upon request, the CADRES office will provide a printed list of names of neutrals (not the full directory) on the Superior Court ADR rosters.

6. Annual Continuing Education Requirements

The CADRES Committee establishes the requirement of annual continuing education for neutrals on all ADR rosters. Neutrals on multiple rosters may apply education hours to more than one roster where relevant. The current requirements are as follows:

a. SC Mediation Roster

For the Small Claims Mediation Roster, the continuing education requirement is 8 hours annually. These hours must be in the subject areas of mediation process skills, consumer law, civil law, court procedure or ethical standards of mediation practice. These hours must be reported annually by December 31.

b. FED Mediation Roster

For the Forcible Entry and Detainer Mediation Roster, the continuing education requirement is 8 hours annually. These hours must be in the areas of mediation process skills, eviction law, civil law, court procedure or ethical standards of mediation practice. These hours must be reported annually by December 31.

c. All Other ADR rosters

For all other rosters, the continuing education requirement is 15 hours annually. The maximum total requirement for multiple rosters is 15 hours.

For the Domestic Relations Mediation Roster, these hours must be in the following subject areas: mediation process skills, Maine family law, domestic abuse or standards of ethical mediation practice. These hours must be reported annually by December 31.

For the General Civil Litigation Mediation Roster and Superior Court Mediation Roster, these hours must be in the following subject areas: mediation process skills, civil law, court procedure or standards of ethical conduct in mediation. For the Superior Court Arbitration and Early Neutral Evaluation Rosters, these hours must be in the following subject areas: ADR process skills, civil law, court procedure or standards of ethical ADR practice. These hours must be reported annually by January 31 of the following year.

d. Inactive Status

A neutral who fails to comply with the continuing education requirement will be placed on “involuntary inactive” status. A neutral may not remain on involuntary inactive status for the sole reason of non-compliance with continuing education more than one year past the date of the deadline or last extension for submission of continuing education hours for a particular year. If continuing education hours are not reported within one year after the deadline, and the deadline for completion of continuing education hours has not been extended, the neutral may be removed from the roster(s).

A neutral may also request to be placed temporarily on “voluntary inactive” status due to personal circumstances (e.g., job change, child care needs, caring for elderly parent, etc.). In order to be reinstated to “active” status, the neutral must complete all outstanding hours. When the neutral applies for reinstatement to active status, the neutral must complete the required hours from the time the neutral became inactive until the time the neutral applies for reinstatement to active status. There is no limit on the length of time that a neutral may remain on inactive status for personal reasons, but the continuing education requirements will remain in effect.

e. Carryover Hours

Continuing education hours may be carried over from one year to the next, but not beyond one year. (For example, excess hours from 2009 may be applied to fulfill the required hours for 2010, but not for 2011.)

7. Periodic Observation of SC, FED and FM Mediators

CADRES' goal is to provide every Small Claims, FED and Domestic Relations mediator with periodic observation as part of professional development and to monitor quality of mediation services. The observation should include time for discussion and feedback following the mediation session. Three part-time Mediation Practice Coaches comprise the CADRES Professional Development Team and assist the CADRES Director in observing and coaching mediators on the District Court rosters. The Mediation Coaches utilize and complete the form entitled "Observation Report," which is discussed with the mediator following the observation. If problems are noted, the mediator has the opportunity to respond on the form after the discussion. Mediation Coaches will communicate any problems observed along with the mediator's written response to the CADRES Director. Particular strengths and practice insights may also be noted.

8. Observation of Mediation by Non-Rostered Persons

To respect the privacy of mediation participants, non-rostered persons are not permitted to observe mediation sessions, except with special permission of the CADRES Director and the parties. Permission is routinely granted to graduate students, law students and CADRES interns who are observing mediation in connection with an academic program, or to foreign visitors in Maine to learn about the U.S. court system. In Small Claims mediation, an exception is also made for those who are acquiring the hours of mediation experience that are required for inclusion on a CADRES mediation roster. Mediators who are admitted to the particular CADRES roster, including new mediators joining that roster, may observe with permission of the parties.

9. Complaint Process

Pursuant to the CADRES Operational Rules, all complaints about neutrals on the CADRES rosters are forwarded to the CADRES Director, who is designated to take responsive action. CADRES Op. Rules § II(3)(A). Written complaints may be submitted to the CADRES Director by letter, email or on the "Exit Questionnaire" form that is distributed to most mediation participants at the conclusion of mediation sessions in FM, FED and SC cases. Verbal allegations received by phone or in person will not be treated as formal complaints but may give rise to supervisory actions.

After receiving a written complaint, the Director will acknowledge the complaint by letter to the complainant. The Director may conduct further review and investigation to gather necessary information relevant to the allegations or may dismiss the complaint without further action. CADRES Op. Rules II(3)(A).

If the CADRES Director initiates a review of a CADRES neutral for any reason, the Director shall notify the neutral of the complaint and review. The CADRES Director may confer with the neutral to discuss the allegations and to hear the neutral's response. The CADRES Director shall review all pertinent information. As applicable, the CADRES Director may personally observe the neutral conducting mediation (or other form of ADR) and discuss the observed session with the neutral. The Director may take further investigative and/or evaluative actions in response to the complaint's allegations. CADRES Op. Rules § II(3)(B). The neutral may review the complaint and other information developed by the Director.

After the investigation is complete, the Director shall inform the neutral in writing about the results of the review and what action shall be taken, if any, to address the allegations or any other problems observed in the course of investigating the complaint. Actions taken may include, but are not limited to, removing a neutral from a roster or roster(s), suspension from a roster or roster(s) for a period of time, or requiring further training, supervision and/or mentoring. Removal or suspension from one or more of the CADRES rosters may occur prior to completion of the review upon the Director's determination that it is in the best interest of CADRES. CADRES Op. Rules II(4).

The CADRES Operational Rules permit a neutral to appeal a decision of the CADRES Director to the CADRES Committee within 14 days of the Director's proposed action letter. CADRES Op. Rules § II(3)(C). If an appeal is made in a timely manner, either party may request mediation of the proposed action. Following a review of the Director's proposed action, the CADRES Committee may affirm, reject or modify the proposed action and shall notify the neutral and the CADRES Director in writing of its decision and the reasons for that decision.

D. ASSIGNMENTS OF NEUTRALS; SCHEDULING

The assignment of neutrals and scheduling of ADR varies by type of case.

1. Small Claims and FED Mediation

The CADRES Director or a designee assigns mediators to conduct mediation in SC cases and FED cases after receiving the schedule of dockets from court clerks. CADRES issues the schedules of SC and FED mediation assignments on a quarterly basis. If the size of a docket does not justify the regular assignment of a mediator, the CADRES Director may assign a mediator only if a party has timely requested mediation pursuant to notice from a court.

Initially, the CADRES Director distributes a draft schedule to provide an opportunity for mediators to decline certain assignments or to change the courts they wish to serve. Subsequently, a final schedule is distributed. Once the final schedule is issued, a mediator is responsible either to appear on the assigned date or to find a substitute mediator.

If sudden illness or an emergency prevents a mediator from appearing at court, the mediator should contact the CADRES Director as soon as possible so that the CADRES Office may attempt to find a substitute. If the illness or emergency occurs on the day of the docket to which the mediator is assigned, the mediator shall make every effort to notify the Clerk of Court that he or she will not appear.

The operation of mediation in Small Claims and FED cases relies on mediators to take responsibility for completing their assignments. One instance of a missed assignment is cause for a warning. If a mediator fails to appear (and fails to find a substitute) a second time, the CADRES Director may take disciplinary action, including removing the mediator from the roster.

2. Family Matters Mediation

In FM cases, mediators provide available dates to the court clerks, and the clerks schedule mediation sessions. This procedure may be altered on occasion or for pilot projects. Mediation takes place in the courthouse, unless otherwise ordered by a Family Law Magistrate or judge, or with permission of the CADRES Director. Generally, permission is granted if one party resides out-of-state and has received permission of the court to participate by telephone; in that instance, mediation often takes place in the office of that party's attorney.

FM mediators may be scheduled for a maximum of two mediation sessions per day. A mediator may request the starting times of those sessions, but the sessions should be scheduled at least three hours apart in order to allow ample time for discussion of all issues at a pace that is

comfortable for the parties, unless otherwise approved by the CADRES Director.

A mediator on the Domestic Relations Mediation Roster must be available to mediate a minimum of four (4) cases for CADRES annually.

FM cases are assigned to mediators by the court clerk in such a manner as to achieve a “generally equitable rotation” among the mediators on the local court roster, as required by the CADRES Operational Rules. CADRES Op. Rules § III(2)(A). Generally, clerks notify mediators of assignments in FM cases by sending a copy of the case management order that includes the date for mediation. Clerks may also use email or other means to notify mediators of mediation assignments or to confirm assignments.

In selected District Courts, mediators are specially assigned to mediate cases referred from the post-judgment Family Matters docket call held periodically. In Portland District Court, a mediator is also specially assigned to cases referred from the weekly Family Matters “motions session.”

The operation of mediation in FM cases relies on the mediators to take responsibility for completing their assignments. Once a case is assigned to mediation, it is the mediator’s responsibility to find a substitute if he or she is unable to appear. If illness or an emergency will prevent a mediator from appearing, the mediator should contact the Director as soon as possible so that the CADRES Office may attempt to find a substitute. If the illness or emergency occurs on the date of scheduled mediation, the mediator shall make every effort to notify the Clerk of Court that he or she will not appear.

When assigned to mediate an FM case, a mediator shall be punctual and shall arrive at the courthouse before the starting time of the mediation session. A mediator shall obtain and review the FM case file before the mediation session is scheduled to begin.

3. Mediation of Civil Cases in District Court

The mediator, parties and counsel schedule mediation of District Court civil cases referred to CADRES. After parties and counsel select a mediator, with assistance from the CADRES Director as necessary, the date, time and place of the mediation session are set by mutual agreement.

4. ADR in Superior Court Civil Cases

The scheduling of ADR sessions in Superior Court civil cases is handled by the neutral, in conjunction with the parties and counsel. The neutral must coordinate the date, time and place of the ADR session by mutual agreement. In general, ADR in Superior Court cases is not held in the courthouse.

5. Land Use and Environmental Disputes

Mediation of land use disputes as part of the statutory land use mediation program, 5 M.R.S. § 3341, or other environmental matters, such as enforcement actions pursuant to 38 M.R.S. 347-A, through CADRES is scheduled by the mediator, parties and counsel. After the parties and counsel select a mediator, with assistance from the CADRES Director as necessary, the mediator sets the date, time and place of the mediation session by mutual agreement.

E. FEE POLICY FOR NEUTRALS

CADRES mediators in FM, FED, and SC cases are paid a fixed fee for mediation. Mediators submit monthly invoices to CADRES, and their fees are paid by check from the State of Maine.

1. Payment for SC and FED Mediation

For Small Claims and FED cases, mediators are paid a fixed fee to appear for a docket, regardless of the number of cases mediated. In other words, a mediator receives the same fee whether two or three cases are referred to mediation, or if no cases are referred to mediation. A mediator is expected to be available to mediate for a half-day (i.e., until noon for a docket that begins in the morning, and until 4:00 pm for a docket that begins in the afternoon). When informed by a judge, deputy marshal or clerk that no more cases require mediation, the mediator may leave.

Reimbursement for mileage traveled to and from the courthouse is paid at the rate authorized by the State of Maine. One roundtrip per day to a courthouse is reimbursed. If a mediator appears at two different courthouses on the same day to mediate at the SC or FED dockets, the mediator is reimbursed for the actual mileage traveled to both courthouses (but not two roundtrips).

Reasonable expenses incurred for parking, tolls and telephone charges are also reimbursed. Reimbursement may be requested from the CADRES director for supplies for the mediation room, such as tissues. The cost of photocopying CADRES forms used in mediation is not reimbursed. Mediators are responsible for the cost of mailing their monthly invoices to CADRES.

A mediator who appears at a court to mediate cases for both the SC and FED dockets in the same morning or afternoon receives one fee for mediating both types of cases. If one docket is held in the morning, and the other docket is held in the afternoon, the mediator is paid a separate fee for each docket but is reimbursed mileage for one roundtrip only.

2. Payment for FM Mediation

Generally, for mediation in FM cases, mediators are paid a fixed fee per mediation session. If multiple mediation sessions occur in the same case, the mediator receives a fee for each session conducted. For example, if a mediation session occurs in June, and another mediation session occurs in the same case in August, the mediator receives a separate fee for each of those sessions.

A fixed fee is paid for mediators at the post-judgment FM dockets, as well as the weekly FM “motions session” in Portland District Court, regardless of the number of cases mediated. A mediator is expected to be available

for a half-day (i.e., until noon for a docket that begins in the morning, and until 4:00 pm for a docket that begins in the afternoon).

If a mediation in an FM case is “not held” (that is, the mediator arrives at court, and the mediation cannot proceed due to the absence of one or more parties or attorneys), the mediator receives a partial fee. If a mediation session is cancelled or rescheduled, but the mediator is informed before reaching the courthouse on the day of the mediation, no fee is paid to the mediator; however, if contacted en route to the courthouse on the day of the scheduled mediation session, the mediator may charge reimbursement for mileage already traveled before receiving notice (including the mileage to return to the starting point). If the mediator is already at the courthouse when notified of a cancellation or continuance of a mediation session scheduled to occur the same day (i.e., mediating a morning case when the afternoon mediation is cancelled), the mediator receives a partial fee for the “not held” mediation session.

Reimbursement for mileage traveled to and from the courthouse is paid at the rate authorized by the State of Maine. One roundtrip per day to a courthouse is reimbursed. If a mediator appears at two different courthouses on the same day to mediate FM cases, the mediator is reimbursed for the actual mileage traveled to both courthouses (but not two roundtrips).

Reasonable expenses incurred for parking, tolls, and telephone charges are also reimbursed. Reimbursement may be requested from the CADRES Director for supplies to the mediation room, such as tissues. The cost of photocopying CADRES forms used in mediation is not reimbursed. Mediators are responsible for the cost of mailing invoices to CADRES, and that mailing cost is not reimbursed.

3. Submission of Invoices to CADRES

Mediators shall submit to CADRES all invoices for mediation services in SC, FED and FM cases within 60 days of the date of the mediation session. Invoices submitted more than 60 days after the date of the mediation session will not be paid, except for good cause as determined by the CADRES Director. Submission of invoices on a monthly basis is strongly encouraged.

4. Payment for Land Use and Natural Gas Pipeline Mediation

The fee for mediation of land use or natural gas pipeline mediation pursuant to 5 M.R.S. §§ 3341, 3345 is fixed at \$175.00 for up to four (4) hours of mediation. 5 M.R.S. § 3341(2)(c). (*See* Administrative Order JB-05-26 (A. 08-09).) The landowner pays this amount with the application filed in Superior Court for land use mediation. Following the mediation session, the mediator submits an invoice to CADRES, and CADRES pays \$175.00 to the mediator. After the first 4 hours of mediation, the parties

may split the cost of mediation, and the mediator will be paid directly by the parties.

5. Payment for Environmental Enforcement Mediation

The fee for mediation of an environmental enforcement action pursuant to 38 M.R.S. § 347-A is \$120.00. (*See* Administrative Order JB-05-26 (A. 08-09).) The mediator submits an invoice to CADRES, and CADRES pays \$120.00 to the mediator.

6. Fee Arrangement for Superior Court neutrals

Pursuant to Rule 16B, neutrals in Superior Court civil cases and other actions subject to Rule 16B negotiate a fee with the parties, by whom they are paid directly. Before ADR commences, neutrals are encouraged to enter into a written fee agreement with the parties that clearly states the terms of payment for services rendered and other relevant fee information.

F. COMPLETION OF CADRES REPORTS AND COURT FORMS

1. SC and FED Mediation

a. Report of Completed Mediation Session Forms

The “Report of Completed Session” form shall be fully and accurately completed by the mediator for each and every Small Claims and FED case mediated. The original of the form is signed by the parties, placed in the case file and returned to the deputy marshal or clerk at the conclusion of the mediation session. The mediator will ask court personnel to copy the form for any party and attorney who so requests, or, if permitted by the clerk, will make the photocopies requested. Copies are made at the conclusion of mediation at no charge.

In SC cases, the detailed agreement of the parties, if any, shall be written accurately and completely on the form in the space provided (and continued on the reverse side if necessary). The mediator shall clearly and concisely set forth specific terms, such as the total amount due, installment amounts, the method and date(s) of payment, form of delivery, etc. If the agreement includes performance of services or delivery of goods, the agreement shall specify the nature of the performance or delivery, the person responsible to perform, all applicable deadlines and all other relevant terms and conditions.

In FED cases, the detailed agreement of the parties, if any, shall be written accurately and completely on the form in the space provided (and continued on the reverse side if necessary). The mediator shall clearly and concisely set forth specific terms, such as a departure date for a tenant, date and amount of any payments to be paid, date and nature of repairs to be made by a landlord, the date on which the Writ of Possession shall issue, etc.

b. Pretrial Report Form

In selected courts, the “Pretrial Report Form” is utilized in Small Claims cases that are not resolved in mediation. The mediator completes the form by obtaining the required information from the parties. The mediator is not responsible for verifying the information provided by parties.

2. FM Mediation

a. Report of Completed Session Form

The “Report of Completed Session” form must be fully and accurately completed by the mediator for each FM mediation session. The original of the form must be signed by the parties, placed in the case file and returned to the deputy marshal or clerk at the conclusion of the mediation session. The mediator will ask court personnel to copy the form for any party and attorney who so requests, or, if permitted by the clerk, will

make the photocopies requested. Copies are made at the conclusion of mediation at no charge.

The form provides a space for signatures of attorneys who are in attendance. Their signatures are encouraged but not required. Other participants in the mediation, including GALs and DHHS representatives, are also asked to sign the form but are not required to do so.

b. Points of Agreement Form

The statute specifies that all mediated agreements must be **signed and in writing**. 19-A M.R.S. § 251(3). Any agreements reached should be summarized by the mediator on the “Points of Agreement” form and signed by the parties. Any attorneys in attendance are encouraged but not required to sign the form.

If any agreement is not in writing, or both parties do not sign the “Points of Agreement” form, there is technically no agreement. In some instances (e.g., where a detailed settlement proposal was presented prior to mediation), attorneys may prefer to draft a proposed order rather than have the mediator complete the “Points of Agreement” form. This is permissible, but the best practice is for mediators to summarize the agreements briefly on the “Points of Agreement” form, have the parties sign the form and note on the “Report of Completed Session” form which attorney has agreed to draft the proposed order.

c. Child Support Worksheet

If a “Child Support Worksheet” form is completed during the mediation, and the parties reached an agreement about the amount of child support to be paid, the Worksheet is to be placed in the case file. If the parties do not reach agreement on child support, the worksheet completed at mediation should not be placed in the file. If a Worksheet filled out by the mediator is to be placed in the case file, the mediator shall circle the “Prepared by” choice at the bottom of the form for “mediator” and label it “Mediation Worksheet” at the top of the form. (See also Section J(4) “Child Support Worksheets and Calculation.”)

3. **Land Use Disputes**

At the conclusion of a mediation session in a land use or natural gas pipeline dispute pursuant to 5 M.R.S. §§ 3341, 3345, the mediator shall report the outcome and provide a copy of any written agreement to the CADRES Director for use in reporting to the Maine Legislature.

4. Superior Court Civil Cases

a. Report of ADR Conference and Order

At the conclusion of an ADR session in a civil case in Superior Court pursuant to Rule 16B, the neutral should complete the “Report of ADR Conference and Order” form. Pursuant to Rule 16B(h)(2), the neutral is responsible for sending the completed form to the Clerk of Court. If the neutral fails to send the form to the Clerk of Court, the parties are responsible for submitting a report to the court. *See* Rule 16B(h)(2).

5. Exit Questionnaires in SC, FED and FM Cases

At the conclusion of mediation sessions, mediators in SC, FED and FM cases shall attempt to distribute the CADRES Exit Questionnaire to all parties in mediation. (Attorneys may also complete this form.) Parties may return completed questionnaires to the mediator or send them directly to the CADRES office using the available pre-addressed envelopes that CADRES will periodically supply to mediators. Mediators shall return all completed questionnaires to CADRES. Mediators shall not open sealed envelopes.

G. DOMESTIC ABUSE SCREENING AND MEDIATION IN FM CASES

Domestic abuse presents one of the greatest challenges for mediation in Family Matters cases. It is for this reason that mediators are required to have prior training in the dynamics of domestic abuse before they are added to the roster. Mediators are expected to show sensitivity to parties in relationships with a history of domestic abuse and make every effort to ensure the safety of all participants in mediation.

1. Mandatory Domestic Abuse Screening Sessions

Before every mediation session in FM cases, the mediator must meet with the parties separately in private sessions (with the party's attorney, if any) for the purpose of screening for domestic abuse according to the *CADRÉS Domestic Abuse Screening Guidelines*. Screening determines whether mediation is appropriate at all and whether the parties will mediate in the same room or separate rooms. Mediators should be cognizant that domestic abuse may have occurred even if no Protection from Abuse (PFA) Order has been sought or issued.

The mediator is expected to exercise professional judgment to determine whether mediation is appropriate in the particular case on the particular day. Appropriateness depends on the following factors: (a) whether the parties are able to speak freely without fear of reprisal; (b) whether mediation can proceed without intimidation and coercion; and (c) whether mediation will be a safe environment for everyone. The initial screening session helps the mediator to determine whether the mediation will take place with the parties in the same room or in separate rooms. Parties shall be informed of the option to sit in separate rooms while the mediator "shuttles" back and forth.

2. Terminating Mediation on Account of Domestic Abuse

If a mediator determines that a case is not appropriate for mediation because any of the factors set forth in Subsection 1 above is present, the mediator should not commence mediation. If the session has already begun and a factor becomes apparent, the mediator should terminate the mediation session. The decision not to proceed or to terminate a session should be announced as the mediator's own decision and should not, under any circumstances, be attributed to domestic abuse or to information revealed by a party. If necessary, the mediator should assist in planning a safe exit from the courthouse for the party who is the alleged victim of domestic abuse or expresses a concern for personal safety. A deputy marshal may be notified. On the "Report of Completed Session" form, the outcome of the case shall be marked as "unresolved." The Report should not be marked as "not held," because that would likely result in referral of the case to mediation again.

3. Cases in Which a Protection from Abuse Order Exists

In determining whether to hold mediation with the parties in the same room or in separate rooms, or if mediation should be held at all, the mediator shall comply with the terms of any existing Protection from Abuse (PFA) Order (as well as any bail conditions), if one has been issued. The mediator should obtain the case file for any related PFA action, or a copy of the complaint and any existing PFA Order, from the clerk when obtaining the FM case file for mediation.

The mediator must determine whether a PFA Order exists regarding one or both parties. If there are children involved and a case management conference has been held, the mediator should refer to the Case Management Order, which should contain a reference to any past or current PFA Orders (or bail conditions). If a mediator is uncertain whether a PFA Order is or has been in effect, the mediator should ask the clerk, and may request the PA case file.

If there is a PFA Order in effect, the mediator must determine what type of contact, if any, the Order permits for purposes of mediation. The mediator shall comply with the terms of the PFA Order. If the Order states that the parties shall have no contact, either direct or indirect, the mediation shall take place in different rooms. The parties shall be separated from one another at all times during mediation. This type of “indirect” contact is permitted at the courthouse to engage in mediation.

If the Order permits direct contact between the parties for purposes of discussing parenting issues at mediation, the mediation shall occur with the parties in separate rooms, except in limited circumstances. The mediation may take place with the parties in the same room *only* if the mediator believes that mediation can proceed safely with the parties in the same room and poses no apparent danger during or after the mediation session, *and all* of the following factors are present: 1) both parties are represented by counsel; 2) the Order was issued without a finding of abuse; and 3) all parties and counsel agree after well-considered discussion that mediation can safely occur with the parties in the same room. The mediator should also consider alternative formats for the mediation session, such as inviting the two attorneys to accompany the mediator in “shuttling” back and forth between the rooms and the parties, or convening the two attorneys only, and then joining the attorneys in separate meetings with their clients.

H. PRIVILEGE, CONFIDENTIALITY AND INADMISSIBILITY

[SECTION H RESERVED]

I. PRACTICE ISSUES IN SMALL CLAIMS AND FED MEDIATION

1. Who May Attend and Participate

Any party may be accompanied in mediation by a support person (in addition to an attorney, if any), *unless* the mediator determines that such support person's presence is not conducive to mediation.

If permitted to be present in a joint session, the support person may not speak or otherwise participate in the mediation session, except with permission of the mediator. The party and the support person may confer with each other during a break in the mediation session or during a private caucus. If a support person is present during a private caucus, the support person may speak and interact with the party and mediator, as appropriate. Support persons in mediation are bound by the same restrictions on disclosure applicable to the parties and shall be so informed by the mediator.

The mediator makes the final determination on who may be present in the mediation room at any given time during a mediation session, except that a party is always entitled to have his or her attorney participate in mediation. If, in the mediator's judgment, it would serve the interest of mediation, the mediator may refuse a request for participation of a support person or may direct a support person to leave the mediation room. The mediator shall permit a party ample opportunity to talk to a support person outside the room or at a break and shall remind the parties and attorneys that they may request a break at any time.

2. Length of Mediation Session

The length of the mediation session is determined by the needs of the parties and the mediation process, within reasonable limits. There is no fixed or pre-set length of time for mediation. The session continues as long as it is productive and all participants are willing to continue to mediate. Mediation occurs in the courthouse during business hours between 8:00 am and 4:00 pm, unless otherwise ordered or except with special permission. Mediation almost always occurs on the same day as the hearing. The mediator should be mindful of the simultaneous flow of proceedings in the courtroom. Promptly returning the parties and the case file to the courtroom as soon as mediation concludes will assist the court in holding timely trials in cases that are not resolved in mediation.

3. Reporting Outcome of Mediation

The mediator must complete a "Report of Completed Session" form for each case mediated. The original of the form is inserted into the case file. If the parties and/or counsel request copies, the mediator will ask court personnel to make copies or for permission to enter the Clerks' Office to make the copies. There is no charge to the parties or counsel for such copies.

4. Effect of Agreement

All agreements reached in Small Claims mediation are placed in the public court file and are reviewed by a judge. In many courts, the parties are expected to return to the courtroom immediately following their mediation session with a copy of their agreement, and the judge will review it. Mediators should check with the deputy marshal or clerk for instruction on whether to direct parties back to the courtroom after a case is resolved in mediation. Generally, the judge will enter a judgment that incorporates by reference the agreement drafted by the mediator. The parties' agreement has no effect until a judge enters a judgment incorporating the agreement.

5. Pretrial Report Form (selected courts and counties)

In selected courts and counties (currently York County courts, Lewiston and West Bath), a pretrial report form is also utilized in Small Claims cases that are not resolved in mediation. The mediator completes the form by obtaining the required information from the parties about the number of exhibits, number of witnesses, anticipated length of trial, etc. Completion of the form should take no more than 3-5 minutes. The mediator is not responsible for verifying the information provided by the parties.

6. Damages in Excess of Small Claims Statutory Amount

If, after the case is referred to mediation, it becomes clear that the plaintiff has claimed damages that exceed the statutory amount allowable for Small Claims (currently \$6,000), a mediator shall advise both parties that the case is subject to possible dismissal by the judge for lack of jurisdiction, or the party may amend the claim to \$6,000 or less. (If a case were dismissed for exceeding the jurisdictional limit for Small Claims, the plaintiff could re-file it as a civil action.)

7. Continuances

Mediators may not grant continuances. If a party wishes to request a continuance for any reason, the party must ask a judge for that continuance or speak to a clerk. If the parties agree that they would like to engage in a second mediation session, the mediator shall notify the clerk and refer the parties to the clerk for guidance on whether they must request a continuance from a judge for the purpose of further mediation.

J. PRACTICE ISSUES IN FAMILY MATTER MEDIATION

1. Who May Attend and Participate

Any party may be accompanied in mediation by a support person (in addition to an attorney, if any), *unless* the mediator determines that such support person's presence is not conducive to mediation.

If permitted to be present in a joint session, a support person may observe silently but may not speak or otherwise participate in the mediation session, except with permission of the mediator. The party and the support person may confer with each other during a break in the mediation session or in a private caucus. If a support person is present during a private caucus, the support person may speak and interact with the party and mediator, as appropriate. Support persons in mediation are bound by same restrictions on disclosure applicable to the parties and shall be so informed by the mediator.

The mediator makes the final determination on who may be present in the mediation room at any given time during a mediation session, except that a party is always entitled to have his or her attorney participate in mediation. If, in the mediator's judgment, it would serve the interest of mediation, the mediator may refuse a request for participation of a support person or may direct a non-party to leave the mediation room. In that situation, the mediator shall remind all participants that mediation is an informal process and that anyone may request a break at any time. The mediator shall permit a party ample opportunity to talk to his or her support person outside the mediation room or at a break.

2. Option of Meeting in Separate Rooms

Parties have the option of mediating separately with the mediator. This may be accomplished by seating the parties in separate rooms with the mediator engaged in "shuttle diplomacy," or the parties may take turns entering and exiting the room where the mediator remains. The mediator shall advise the parties of this option. When either party expresses a reluctance to meet together for reasons *other than* domestic violence, the mediator shall discuss with them the advantages and disadvantages of meeting in separate rooms.

3. Length of Mediation Session

The length of the mediation session is determined by the needs of the participants and the mediation process, within reasonable limits. A mediation session continues as long as it is productive, all participants are willing to continue to mediate and the mediation schedule for the day allows. There is no fixed or pre-set length of time for mediation. Generally, an FM mediation session may last up to half a day (i.e., 3 hours or more). The length of a mediation session should not be artificially

shortened by a case conference with the magistrate or judge, if one is set for the same day and can be held at a later time. If mediation is still in progress at the time of a case management, status or pretrial conference, the mediator should advise the deputy marshal that the mediation is ongoing and offer an estimate of the additional time needed for mediation. The deputy marshal will inform the magistrate or judge of the additional time needed for mediation.

4. Child Support Worksheets and Calculation

The parties are required to submit current Child Support Worksheets and Affidavits (as well as Financial Statements, where applicable) prior to mediation. If all parties have not done so, or their circumstances have changed, a new Child Support Worksheet may be needed. If at least one attorney or a DHHS Support Enforcement Agent is present, the attorney or Agent should perform the necessary calculations and explain them. If no attorney or DHHS Agent is present, the mediator shall complete the Worksheet based on information supplied by the parties. If a Worksheet is filled out by the mediator, and the parties reach agreement on child support, the mediator shall circle the "Prepared by" choice at the bottom of the form for "mediator," label it "Mediation Worksheet" at the top of the form and place it in the case file. If the parties do not reach agreement on child support, the Worksheet completed at mediation should not be placed in the case file.

If parties agree on an amount of child support other than the amount resulting from a calculation based on the Child Support Guidelines, the Points of Agreement form should reflect the actual amount agreed by the parties and state that the amount would be a deviation upward or downward from the Child Support Guidelines, along with a brief explanation as to why the parties believe that the deviation is appropriate. The mediator shall advise the parties that a deviation may or may not be ordered by the magistrate or judge, even if agreed upon by the parties.

When completing a Child Support Worksheet, a mediator should make the relevant calculations slowly and explain each step carefully to each party (more than once, if necessary) to make sure that each party understands the calculations. Upon completion of the Worksheet, the parties may or may not agree with the amount that is produced by the formula or tables.

For any child who is ten (10) or eleven (11) years old, the mediator should calculate a second Child Support Worksheet showing the child support obligation when that child turns twelve (12) years old.

5. Working with DHHS Support Enforcement Agents

When the Department of Health and Human Services (DHHS) is involved with child support, a Support Enforcement Agent may attend mediation. If possible, the issue of child support should be addressed early in the

mediation session. The Agent should be present in the mediation room only for the discussion of child support, not for the discussion of other issues related to the case, such as parental rights and responsibilities, primary residence and parent-child contact.

6. Working with Guardians Ad Litem

A Guardian ad Litem (GAL) has the status of a party and is entitled to participate in mediation of an FM case. The mediator shall hold a separate screening session with a GAL to determine if the GAL has prepared a report and the most effective way to proceed with mediation. The mediator shall remind the GAL of the applicability of the Maine Rules of Evidence to statements and conduct in mediation (and that the GAL may not include any statements or conduct from mediation in the GAL's report). At the discretion of the mediator, a GAL may participate in joint and private sessions with the parents, or with one parent or counsel. A mediator may hold private caucuses with the parties and/or counsel that do not include the GAL.

7. Reporting Suspected Child Abuse or Neglect

Mediators are not required by statute to report child abuse or neglect. If a mediator learns of suspected child abuse or neglect, the mediators may make an anonymous report to DHHS or notify the CADRES Director. Such reports are not necessary if the mediator has reason to know that DHHS is already involved with the family, or an attorney representing a parent has made or will make a report to DHHS. If a mediator elects to report suspected child abuse or neglect, the mediator should gather the following information from the case file: name(s), age(s) and address(es) of the child(ren); parents' names and addresses; and school(s) currently attended by the child(ren).

8. Reporting Outcome of Mediation

At the conclusion of each mediation session, the mediator shall complete the "Report of Completed Session" form for FM cases. Only one "check box" for the disposition (resolved, partially resolved, unresolved, unfinished or not held) shall be marked for a mediation session.

9. Effect of Agreement

All agreements reached in mediation of FM cases must be reviewed by a judge or magistrate for a determination of whether the agreement is "in the best interest" of the child or children. After mediation, the parties must appear in court for this judicial review. If the matter is not heard on the same day as mediation, the court will assign a date for this review and notify the parties and counsel, if any. A written agreement reached in mediation, whether or not on the "Points of Agreement" form, does not have the effect of a court order. Rather, it is a written contract between the

parties. The agreement has the force and effect of a court order only after approval by a judge or magistrate and entered as a judgment.

10. Scheduling a Second or Third Session

If the parties wish to schedule another mediation session, the mediator may set a tentative date and time with the parties but must confirm the date and time with the clerks' office. The date and time of the next session is not final until approved by the clerk.

11. "No Show" Session

A mediator in a FM case is expected wait at least 30 minutes past the scheduled starting time of a mediation session for a party or attorney to appear before declaring the session "not held" due to a "no show" participant, unless that party or attorney has already notified the court that he or she will not appear at the scheduled mediation session.

K. PRACTICE ISSUES IN SUPERIOR COURT RULE 16B ADR

1. Who Must Participate

Pursuant to Section (f) of Rule 16B, the following attendees must participate in an ADR session:

- a. Individual parties;
- b. A management employee or officer of a corporate party with appropriate settlement authority;
- c. A designated representative of a government agency party;
- d. An adjuster for any insurance company providing coverage potentially applicable to the case (with appropriate settlement authority);
- e. Counsel for all parties; and
- f. Nonparties whose participation “is essential to settlement discussions” may be requested to attend.

At the discretion of the neutral, attendance may be by telephone or videoconference, if there is good cause to do so. M.R. Civ. P. 16B(f)(3).

2. Deciding Who Else Should Participate

The neutral, in consultation with the parties and counsel, determines who, in addition to the compulsory participants, should participate in the ADR session to make it an effective and worthwhile forum for potential dispute resolution. The neutral asks counsel or parties if any individual or entity not listed holds a critical interest or stake in the outcome, or could prevent a full settlement of the case. If so, the neutral should confer with the parties and counsel to obtain their agreement to include the additional participant(s) in the ADR session.

3. Arranging the ADR Session; Location

The neutral should take an active role in arranging the time and place of the ADR session. In making the arrangements, the neutral should ensure that the session takes place in a location perceived as neutral by all participants and at a time mutually agreeable to all. Typically, the ADR session will be held at the neutral’s office or at the office of one of the attorneys in the case. In rare circumstances, an ADR session may be held at the courthouse, provided that space is reasonably available and permission is obtained from the Clerk of Court.

4. Submitting Report after ADR Session

Pursuant to Section (h) of Rule 16B, the neutral must submit a report of the ADR session within 10 days after the ADR session occurs, whether or not a settlement occurs. If the neutral fails to submit the report, the parties are equally responsible to file the report. If no report is filed by the time of

the next court event, the parties may be sanctioned for failure to file the report.

5. Sanctions

Section (l) of Rule 16B authorizes the court to impose sanctions if a party or party's lawyer who has been notified of an ADR session fails to appear or fails to comply with any requirement of Rule 16B or any order made pursuant to the rule.

L. CODE OF CONDUCT FOR NEUTRALS AND CONFLICTS OF INTEREST

1. Code of Conduct for Judicial Branch Neutrals

All neutrals on court ADR rosters shall comply with the Code of Conduct for Judicial Branch Neutrals (“Code of Conduct”) (see Appendix II-E), including those specifically addressed below.

2. Treat Parties with Courtesy and Respect

All neutrals on court ADR rosters shall be patient, dignified, and courteous to all participants in the ADR process, including litigants, other persons who may accompany them, and lawyers and legal staff, as well as to all others with whom the neutral deals in an official capacity. All neutrals should attempt to require similar conduct of others subject to the neutral’s direction.

3. Conflict of Interest

The Code of Conduct for Judicial Branch ADR Neutrals directs that a neutral must decline to accept an assignment, or withdraw from a case, if there is a conflict of interest or a reason to believe that a neutral “could not act with complete impartiality.” Canon 2 (C)(1).

A mediator, arbitrator, or early neutral evaluator must disclose any “social, professional, or financial relationship or interest with any participant or representative involved in the process that may affect objectivity or impartiality or which might create an appearance of partiality or bias.” Canon 2(C)(1).

If a conflict of interest exists that clearly compromises a neutral’s impartiality, the neutral must withdraw, even if the parties consent to use the services of that neutral.

When in doubt about whether a conflict of interest exists, ADR practitioners should exercise an abundance of caution by disclosing to all potential ADR participants any relationship or other facts that raise a potential question about conflict of interest. All participants should have the opportunity to know the relevant facts before consenting to the service of the neutral.

4. Subsequent Professional Work for ADR Parties

After serving as a neutral in a court ADR session, a neutral on the court ADR rosters shall not perform private professional services (e.g., as a lawyer, mediator, therapist, GAL or parent coordinator) for a party in that court ADR session for a period of at least 6 months following the session.

M. SELF-DETERMINATION OF PARTIES IN MEDIATION

Self-determination of the parties is a fundamental tenet of mediation, and mediation is intended to be a forum in which the parties make decisions for themselves. In mediation, a mediator shall respect the right of the parties to determine the outcome and shall not abuse the mediation position to impose a decision on the parties about substantive issues or otherwise impair or impede the ability of the parties to make decisions for themselves (with the advice of counsel or other professionals, if any).

A mediator shall not exert undue pressure on parties to settle their case. The use of reality-testing (e.g., "What do you think will happen if you don't resolve this here today?") and similar questioning or discussion is appropriate. However, a declaration that a party should accept or reject a particular settlement offer is inconsistent with the principle of self-determination and is not appropriate.

A mediator may offer suggestions or proposals but should preface such suggestions or proposals with appropriate disclaimers, such as that the parties are free to reject it and that the mediator's suggestion or proposal may or may not be practical or suitable for those parties.

N. LEGAL ADVICE IN MEDIATION

A mediator shall refrain from providing individual legal advice to mediation participants.

Mediators who are also licensed attorneys shall comply with Rule 2.4 of the Maine Rules of Professional Conduct, including, but not limited to, the requirement that a mediator inform unrepresented parties that the lawyer serving as a neutral is not representing them, and that a lawyer serving as a neutral “shall not attempt to advance the interest of any of the parties at the expense of any other party.” See Rule 2.4(b), (c).

A mediator may offer information about court procedures. For example, in an FM case, a mediator may describe the purpose of a case management conference or indicate that it may be possible for a judge or magistrate to enter a court order that day, or even to award a final divorce, if the parties reach an agreement on all issues.

A mediator may offer information about court forms, including the use of the Child Support Guidelines and calculation of child support on the Child Support Worksheet.

A mediator may provide a copy of the relevant statute to a party or provide a copy of an explanatory booklet prepared by the court or an approved non-profit organization devoted to legal assistance of indigent parties, such as Pine Tree Legal Assistance.

A mediator may suggest that a party consult an attorney or provide contact information for non-profit providers of legal services, such as the Volunteer Lawyers Project, Pine Tree Legal Assistance or the Cumberland Legal Aid Clinic.

O. GOOD FAITH

A requirement to participate in “good faith” applies to mediation in certain types of cases. This requirement means that parties must attend mediation, must engage in discussions for the purpose of attempting to resolve the dispute and must comply with applicable statutes, rules and policies. “Good faith” does not require a prescribed length of time that a party or attorney must spend in a mediation session, nor does it require that a party or attorney must make an offer or counteroffer in mediation.

It is expected that mediators will establish an atmosphere that encourages productive, civil discussion and active engagement of the parties and attorneys, if any.

1. Requirement in FM Mediation

In FM cases, the applicable statute requires that parties make a “good faith effort to mediate the issue before proceeding to a hearing.” 19-A M.R.S. § 251(4).

A mediator should refrain from engaging in extended debate at mediation about whether a party is mediating in good faith. If the good faith of a mediation participant is challenged, the best practice is to leave the controversy to the parties and/or attorneys. For example, if a party or attorney wishes to pursue a claim of lack of good faith against another party or attorney based on particular conduct, he or she may elect to file a motion for sanctions with the court. In appropriate instances, the mediator may add a notation to the Report of Completed Session form to indicate the mediator’s belief that there is a question whether a party or attorney participated in good faith.

Section 251(4) expressly authorizes the court to impose sanctions for failure to make a good faith effort to mediate. The sanctions may include: ordering the parties to submit to mediation, dismissal of an action or part of an action, entry of decision or judgment by default, assessment of attorney’s fees or any other sanction that is appropriate in the circumstances. 19-A M.R.S. § 251(4). Section 251(5) also authorizes sanctions for the failure to appear at mediation without good cause after receiving notice of a scheduled mediation.

Additionally, M. R. Civ. P. 92(g) authorizes sanctions if a party or party’s attorney fails to appear at mediation or any other ADR process or fails to comply with any other requirement of Rule 92 or any court order issued pursuant to that rule. The mediator is not responsible for reporting or pursuing such failure, except to the extent called for on mediation forms.

2. Requirement in FED Mediation

In FED cases, the applicable statute requires that the parties make a “good faith effort to mediate the issue before proceeding to a hearing.” 14 M.R.S.

§ 6004-A(2). If the court finds that either party failed to make a good faith effort to mediate, the court may impose sanctions, including an order to return to mediation, dismissal of all or part of the action, default judgment, assessment of attorney's fees and costs or any other sanction that is appropriate in the circumstances.

3. Sanctions Authorized

Sanctions in all mediation covered by M.R. Civ. P. 92 are authorized by Section (g) of the rule.

Sanctions may be imposed for failure to appear at mediation or other ADR processes or failure to comply with any other requirement of Rule 92 or any court order issued pursuant to the rule.

P. ACCOMMODATION FOR DISABILITY

1. General Policy

The Judicial Branch of the State of Maine does not condone discrimination in any form against anyone, including persons with disabilities. Discrimination against anyone, including persons with disabilities, violates the individual's civil rights, undermines the integrity of the court system and the workplace, and adversely affects the equal administration of justice.

It is the policy of the Judicial Branch of the State of Maine that programs, activities, services and facilities of the court system will be fully accessible to all, including individuals with disabilities, as required by fairness and justice as well as the Americans with Disabilities Act, the Rehabilitation Act of 1973 and the Maine Human Rights Act.

2. Accommodations and Auxiliary Aids and Services

The Judicial Branch recognizes its obligation to make appropriate accommodations and provide auxiliary aids and services to assure effective communication with and participation of individuals with disabilities who have contact with the court system. It is a priority of the Judicial Branch to develop and promptly obtain the necessary auxiliary aids and services for every courthouse. In the meantime every effort will be made to provide accommodations to ensure effective communication with and participation of individuals with disabilities in the court system.

Accommodations are to be furnished at no charge to persons with disabilities. In most cases, presentation of proof of disability is not required. Examples of accommodations that may be provided include the following:

- Qualified sign language, oral, and cued speech interpreters;
- Real-time transcription services (CART);
- Assistive-listening devices
- Provision of court documents in large-print and Braille;
- Recording equipment, if approved in advance as an accommodation for disability (with any recording made to remain at the courthouse on a temporary basis only and later destroyed);
- TTY and amplified telephones; and
- Arrangements for service dogs to remain with their owner at all times.

The Judicial Branch will also provide any other reasonable accommodation necessary to permit a person with a disability to participate fully in or to observe court activities.

Specifically, persons with disabilities are entitled to appropriate accommodations in mediation. For example, these may include: allowing the attendance of a caseworker, arranging for attendance of a qualified interpreter, taking frequent breaks, writing down offers in the course of mediation (in addition to transmitting them orally) and other reasonable measures.

Q. DETERMINING A PARTY'S CAPACITY TO MEDIATE

If, at the time of mediation, it appears that a party lacks the capacity to understand the nature of the mediation process, participate effectively in mediation or engage in sound-decision making, and no accommodation can ameliorate this incapacity, the mediator shall decline to mediate. The mediator may direct the parties to request that mediation be rescheduled to another day and/or mark the session as "not held" on the Report of Completed Session form (indicating the reason so that the circumstances do not reoccur).

R. MEDIATING WHEN INTERPRETERS ARE USED

1. Need for Interpreters

Parties with limited English proficiency (LEP) in court-sponsored ADR are entitled to the assistance of an interpreter, which is governed by Administrative Order No. JB-06-3. The clerks' office arranges for interpreter services for court proceedings, including mediation. If a party at mediation appears to require an interpreter's assistance and no interpreter is present, the mediator should advise the clerk and ask that telephone interpreter assistance be provided through Language Line or a local interpreter by speakerphone. If interpretation is unavailable, mediation must be rescheduled for a date when such services are available.

The use of a friend or relative for spoken language or sign interpretation, rather than a professional interpreter, is never appropriate. When a party arranges for a friend or relative, rather than a professional interpreter, to attend mediation in order to assist with language interpretation, the mediator should direct the parties to the court clerk to arrange for a professional interpreter and reschedule the mediation.

2. Use of Interpreters

It is the mediator's responsibility to ensure that all parties understand the role of the interpreter, which is to interpret all of the proceedings from English to another language, and to interpret a party's language into English. At a minimum, the mediator should: (1) remind all participants and the interpreter that the interpreter is not an advocate, counselor or lawyer; and (2) remind the interpreter to ask the mediator about any questions posed by a party about mediation or the meaning of anything said in the mediation session and to relate all questions or comments by a party during mediation.

The mediator should establish with the interpreter that he or she is qualified to interpret the mediation session by asking if he or she can communicate fluently in the language or dialect to be used; if he or she can communicate with the party or parties; if he or she understands the nature of mediation; and if he or she knows any of the parties or attorneys.

When an interpreter is used, the mediator should speak directly to the parties, not to the interpreter. The mediator should allow only one person to speak at a time. In a long session, the mediator should provide rest breaks for the interpreter.

If the mediator senses a problem with interpretation (e.g., the interpreter appears not to be interpreting everything that is said, or the length of the interpreted statements is much longer or shorter than the statements in

spoken English), the mediator should speak to the interpreter privately to address the problem, or ask the clerk to reschedule the mediation at a time when other professional interpretation services can be arranged.

3. Forms

Interpreters are not required to sign the “Report of Completed Session” form or other mediation forms. They are required to submit other forms required by the Limited English Proficiency Program, including forms related to payment. Interpreters should be directed to the clerks’ office for further information related to their forms.

S. IMMUNITY

1. FM, SC and FED Mediators

FM, FED, and SC mediators and other mediators in District Court pilot projects are considered to be “under contract” with the Judicial Branch and are therefore immune from civil liability pursuant to 4 M.R.S § 18-A.

2. Superior Court Neutrals

Neutrals on the Superior Court ADR Rosters are not considered to be “under contract” with the Judicial Branch and therefore are presumed not to enjoy immunity from civil liability pursuant to 4 M.R.S § 18-A.

T. SECURITY

All neutrals on court ADR rosters shall observe all security measures in effect and follow directions of the deputy marshals and judicial marshal staff at the courthouse.

In mediation rooms in the courthouse, mediators are encouraged to take the seat nearest the door. If any violence or threats of violence occur in mediation, the mediator shall leave the room or activate any emergency response device and shall immediately seek assistance from the judicial marshal staff or clerk. A mediator shall not attempt to intervene in an altercation or place himself or herself at risk of harm.

U. ACCESS TO CLERKS' OFFICES AND COURT FILES

Pursuant to Administrative Order JB-05-11 (amended October 1, 2008), CADRES mediators are permitted to enter the offices of the clerks at District and Superior Courts at the specific direction of the clerk or justice, judge or magistrate when necessary to complete court business, which may include use of the photocopier and telephone.

Mediators may have possession of court files at the specific direction of a clerk, justice, judge or magistrate in the courthouse for purposes of conducting court business.

V. PROFESSIONAL DECORUM AND APPEARANCE

Neutrals on court ADR rosters are expected to maintain professional decorum in their work as ADR providers. This includes professional dress and appropriate conduct at all times while in the courthouse and vicinity. CADRES mediators in District Courts shall display their court ID badges upon entry and while working in the courthouse.

APPENDICES

(not attached)

I. Statutes

- I-A 4 MRS § 18-B - CADRES Committee Membership
- I-B 19-A MRS § 251 - Mandatory Mediation in Contested Family Matters Cases
- I-C 5 MRS §§ 3331, 3341 - Land Use and Natural Gas Pipeline Mediation
- I-D 38 MRS § 347-A – Mediation in Environmental Enforcement Actions
- I-E 14 MRS § 6004-A –Mediation in Forcible Entry and Detainer Cases

II. Rules

- II-A M.R.Civ. P. 92
- II-B M.R.Civ. P. 16B
- II-C CADRES Operational Rules
- II-D Appendices to CADRES Operational Rules (roster requirements)
- II-E Code of Conduct for Judicial Branch Neutrals

III. Other

- III-A CADRES Guidelines for Pre-Service Mentoring